Washington Supreme Court No. 79872-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint of:

RICHARD J. DYER,

Petitioner.

REPLY BRIEF ON PERSONAL RESTRAINT PETITION

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II.[1] OVERVIEW

The thrust of Mr. Dyer's PRP is that the ISRB disregarded this Court's ruling in Personal Restraint of Dyer, 157 Wn.2d 358, 139 P.3d 320 (2006) (Dyer II), when it once again denied parole on remand. In the Response of the Indeterminate Sentence Review Board to Mr. Dyer's Personal Restraint Petition (Response), the ISRB continues in the same vein. Its arguments essentially track those made in response to the prior PRP, with no recognition that this Court has already ruled against it on many issues.

IV. STATEMENT OF THE CASE

The ISRB's statement of the case mirrors what it presented during Mr. Dyer's last PRP. The only mention of Dyer II is a single sentence noting that the Board entered a new decision and reasons following that ruling. Response at 12. The ISRB describes the new decision and reasons as "meticulous," Response at 12, but it too consists mostly of facts and procedural history that this Court fully considered in the last PRP.

V. ARGUMENT

A. THE ISRB ONCE AGAIN ABUSED ITS DISCRETION

Before addressing this issue, the ISRB devotes five pages to a section entitled "Standard of Review." Response at 19-23. There is no

[1] For the Court's convenience, the headings in this reply brief track the headings in the PRP. Because some sections of the PRP are not relevant to the reply, the numbering is at times discontinuous in this brief.

mention in that section of this Court's most recent refinement of the standard of review, which of course is contained in Dyer II. See PRP at 13-16.

The ISRB finds it "offensive" that Dyer criticizes the Board for failing to release him rather than focusing on the "horrific" nature of his crimes. Response at 23-24. This again ignores this Court's ruling that the ISRB should not rely on "the unchangeable circumstances of Dyer's crimes, the same facts that justified the imposition of Dyer's original exceptional sentence." Id. at 365, 367-8.[2]

In fact, in its entire discussion of the abuse of discretion claim, the ISRB does not once mention Dyer II, which held that the ISRB abused its discretion in denying parole. As Dyer points out in his PRP at 23-29, every reason given by the ISRB for denying parole this time was explicitly rejected by this Court in Dyer II. Nevertheless, the ISRB does not even attempt to proffer some new reason for its latest ruling.

The ISRB's main argument is that it properly denied parole "because Mr. Dyer remains steadfast in his denial of guilt for two horrific rape **convictions**, and thus purposefully render[s] himself unamenable for sex offender treatment." Response at 29 (emphasis in original). It made

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[2] See also id. at 360 n.2 ("[T]he dissent's emphasis on the facts of Dyer's crimes disregards the legislature's mandate that an offender's confinement under the indeterminate system and the SRA remain reasonably consistent.") "Despite its statutory mandate to consider whether a prisoner demonstrates his rehabilitation is complete, the ISRB dismissed evidence of Dyer's rehabilitation in prison evidently based on the facts of his underlying crimes." Id. at 368.

precisely the same argument in Dyer II. Its supplemental brief re-stated the issue presented as follows:

> Did the Board abuse its discretion by denying Dyer parole after finding he was not rehabilitated, based on all of the information available to the Board, including Dyer's failure to participate in a sex offender treatment program that was unavailable to him due to his choice to deny responsibility for his two First Degree Rape convictions?

Respondent's Corrected Supplemental Brief at 10. Ex. A. The ISRB then devoted its entire argument to the proposition that Dyer's denial of guilt and his "failure" to undergo sex offender treatment were valid reasons for denying parole. Id. at 12-21.

In Dyer II, this Court acknowledged that Dyer denied guilt and that he had not undergone sex offender treatment, although it viewed the situation a bit differently than the ISRB. "Dyer has not been permitted to enter the sex offender therapy program because he denies committing the rapes for which he was convicted." Id. at 361. See also, Dyer II at 364 (Dyer "does not actively refuse to participate in the sex offender treatment programs; rather he is rendered ineligible for treatment in that program because he denies his guilt"). The Court, of course, concluded that these factors did not justify denial of parole in Mr. Dyer's case. The ISRB then repeated its arguments in its motion for reconsideration, which was denied.

In essence, the Board is now asking the Court to reconsider for a second time, although it does not acknowledge that it is doing so. The law of the case doctrine generally precludes a party from relitigating an issue previously decided by an appellate court in the same case. Roberson v.

Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). The Board does not contend that any exception to that doctrine could apply here.

B. THE APPROPRIATE REMEDY IS AN ORDER DIRECTING THE ISRB TO PAROLE DYER

The ISRB's primary argument is that an order directing it to parole Mr. Dyer would violate the separation of powers doctrine. It relies heavily on Carrick v. Locke, 125 Wn.2d 129, 882 P.2d 173 (1994). To be sure, Carrick recognized that Washington's government – like the federal government – is divided into three separate branches with their own powers. Id. at 134-35. This separation, however, is far from absolute. "The separation of powers doctrine is grounded in flexibility and practicality, and rarely will offer a definitive boundary beyond which one branch may not tread." Id. at 135. Carrick itself held that judicial participation in an inquest did *not* impermissibly interfere with the executive function of investigating crime. Id. at 132.

The ISRB does not cite any case holding that the separation of powers doctrine invariably precludes a court from ordering an agency to take specific action. Dyer has cited to numerous cases from many jurisdictions (including Washington) in which courts entered such orders. See PRP at 29-35.

The Washington parole cases cited by the Board shed little light on the issue presented here. January v. Porter, 75 Wn.2d 768, 453 P.2d 876 (1969), held only that the Superior Court could not order a prisoner to be released on bail when he was held on a parole violation. The Court

affirmed the general power of the courts "to inquire into the legality of the confinement, imprisonment, detention or punishment." Id. at 773. The other Washington parole cases cited by the ISRB merely reiterate the familiar principle that this Court is not a "super Indeterminate Sentence Review Board" and that the Court should not interfere unless the ISRB has abused its discretion. Dyer does not disagree with these general principles. But here, the Court has already found an abuse of discretion. The question is what the Court should do when the ISRB repeats the same abuse on remand. No Washington case has yet addressed that problem.

In its conclusion, the ISRB maintains that an order directing the ISRB to parole Mr. Dyer would render the agency "superfluous." Response at 61. To the contrary, any other ruling would render this Court superfluous. There is little point in a holding that the ISRB abused its discretion if the Board is permitted to ignore the ruling and repeat the same abuse. This Court must enforce its rulings so as "to maintain an effective system of checks and balances." See Carrick, 125 Wn.2d at 135.

C. THE ISRB'S DECISION VIOLATES RCW 9.95.009(2)

The ISRB maintains that In re Myers, 105 Wn.2d 257, 714 P.2d 303 (1986), supports its position because it held that RCW 9.95.009(2) was not void for vagueness. Response at 31-32. But this Court rejected the vagueness claim in Myers because the statute provided meaningful standards that would remedy the disparity between indeterminate sentences and those under the SRA. See PRP at 37-38. Myers therefore

supports Dyer's position that RCW 9.95.009(2) imposes new and significant limitations on the Board's discretion to deny parole.

Nor does In re Locklear, 118 Wn.2d 409, 823 P.2d 1078 (1992), support the ISRB's position. That case held that similar treatment of SRA and pre-SRA offenders was required not only by statute, but also by the equal protection clause. Id. at 416. To be sure, Locklear recognized that the ISRB could take lack of rehabilitation into account when setting a minimum term even though the SRA does not rely on that factor. Dyer does not dispute that holding, but merely argues that the ISRB must prove a significant lack of rehabilitation when its ruling has the effect of increasing a prisoner's sentence beyond the SRA standard range. See PRP at 39-40. In Locklear itself, the prisoner's lack of rehabilitation was truly extreme. He was twice paroled and twice revoked for serious new offenses. Id. at 411-12.

> [Locklear] was granted another opportunity to demonstrate that he could be law abiding and adhere to the fidelity of parole conditions. He has subsequently failed to do this and demonstrates his lack of rehabilitation by an ongoing use of hard drugs[,] specif[i]cally cocaine and heroin.

Id. at 412 (quoting ISRB decision).

In this section of its brief, the ISRB finally cites to Dyer II, but only to the dissent. Response at 35-36. It does not acknowledge the majority's reliance on RCW 9.95.009(2).

D. TO THE EXTENT THE ISRB RELIED ON RCW 9.95.009(3), ITS DECISION VIOLATES THE EX POST FACTO CLAUSE

Dyer argues that RCW 9.59.009(3), which requires the ISRB to give "highest priority" to public safety, cannot be applied to him because it was enacted after the date of his offense and after the date his minimum term was set. See PRP a 41-43. In the ISRB's view, a petitioner can prevail on an Ex Post Facto Clause claim only if he can prove with certainty that he is receiving a longer sentence as a result of a new statute. That view has been soundly rejected by the federal courts.

In two cases, the U.S. Supreme Court has found that laws violate the Ex Post Facto Clause when they reduce the opportunities for early release credits. See PRP at 41-42, discussing Lynce v. Mathis, 519 U.S. 433, 117 S. Ct. 891, 137 L. Ed. 2d 63 (1997) and Weaver v. Graham, 450 U.S. 24, 67 L. Ed. 2d 17, 101 S. Ct. 960 (1981). Prisoners can rarely prove with certainty that they will earn such credits.[3] In Weaver, the Supreme Court expressly rejected Florida's claim that its alteration of early release options was permissible because the prisoners had no "vested right" to the credits. Id. at 29-30.

The ISRB argues that since Dyer is serving a sentence with a maximum term of life, and was never guaranteed an earlier release, he cannot show that any change in the standards for parole has altered his

[3] It is true that Mr. Lynce himself could demonstrate some certainty because he was actually released before his credits were cancelled. But the majority decision applied as well to prisoners who had not yet been released. Id. at 447. Only the two-Justice concurrence found the fact that Lynce had actually been released to be dispositive. Id. at 449-51.

sentence. Response at 39. By that reasoning, the complete elimination of parole would not violate the ex post facto clause. The U.S. Supreme Court, however, has ruled otherwise. See Weaver at 32, citing with approval Rodriguez v. United States Parole Comm'n, 594 F.2d 170 (7th Cir. 1979) (elimination of parole eligibility held an ex post facto violation). "We have previously recognized that a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." Weaver at 32 (citations omitted).

In fact, the Supreme Court rejected the ISRB's reasoning as far back as Lindsey v. Washington, 301 U.S. 397, 57 S. Ct. 797, 81 L.Ed. 1182 (1937). At the time Mr. Lindsey committed his crime in the State of Washington, the trial court was free to impose any maximum term up to 15 years. The State applied a new statute to Mr. Lindsey, however, that *required* a maximum term of 15 years. Washington argued that there was no ex post facto violation since Mr. Lindsey could have been sentenced to 15 years even under the old law, and in either case he could be released by the parole board long before the maximum sentence expired. Clearly, Mr. Lindsey could not "show with certainty" – as the ISRB claims to be the petitioner's burden – that he would have received less punishment under the old law. Nevertheless, the Supreme Court held that the change in law was "plainly to the substantial disadvantage" of the petitioner. Id. at 401-02. It made no difference "whether this is technically an increase in the punishment annexed to the crime." Id. at 401.

Dyer has cited two federal circuit cases specifically holding that a change in the substantive standards for granting parole violates the ex post facto clause. See PRP at 42, discussing Mickens-Thomas v. Vaughn, 355 F.3d 294 (3rd Cir. 2004) (involving a new statute requiring parole board to give higher priority to public safety) and Brown v. Palmateer, 379 F.3d 1089 (9th Cir. 2004) (finding the relevant law to be clearly established by such U.S. Supreme Court cases as Lynce and Weaver). Nevertheless, the ISRB's response never mentions Lynce, Weaver, Mickens-Thomas, or Brown.

The ISRB relies instead on California Dep't of Corrections v. Morales, 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995), but that case is readily distinguishable. In Morales, California changed its rules to permit the parole board to schedule parole hearings only once every three years for prisoners who had killed more than one person. Previously, the board was required to consider such prisoners every year even if there was no realistic possibility that circumstances would change that quickly. Id. at 503. This did not violate the ex post facto clause because there was no change in the substantive standards for determining suitability for parole. Id. at 507-08. The amendment merely relieved the board from "going through the motions" every year even when it had reasonably determined that a prisoner would not be parolable that soon. Id. at 512. Here, by contrast, RCW 9.95.009(3) expressly changes the substantive standards for parolability.

The ISRB claims that Dyer is merely "speculating" that RCW 9.95.009(3) has affected his chances for parole. If that is so, then why does the ISRB continually cite the statute as a basis for holding him? The Board relied on the statute during the parole hearing and in its written decision. See PRP at 41. In its current response brief, the ISRB relies on the subsection at least four times. See Response at 12, 22, 33-34, 49. It italicizes, underlines and/or uses bold type to emphasize the importance of this statutory amendment. It seems to use RCW 9.95.009(3) as its fallback to rebut any claim that it is improperly holding Mr. Dyer in prison. See, e.g., Response at 33 (because Dyer "remains in denial" and "cannot be treated . . . the Board acted appropriately and in accordance with RCW 9.95.009(3)" when it denied parole).

Thus, because the ISRB's decision relies on RCW 9.95.009(3), it violates the Ex Post Facto Clause.

E. THE BOARD'S DECISION VIOLATES THE FEDERAL EQUAL PROTECTION CLAUSE

The ISRB cites several cases for the proposition that "the distinction between the Sentencing Reform Act (SRA) and indeterminate offenders does not violate equal protection." Response at 40. Those holdings, however, are premised on RCW 9.95.009(2) requiring approximately equal treatment for the two classes of offenders. See PRP at 43-44. If, as the ISRB maintains, it may hold a pre-SRA offender at its whim until his maximum term expires, then the rationale for these holdings disappears.

F. UNDER THE BOARD'S REASONING, RCW 9.95.009(2) VIOLATES THE EX POST FACTO CLAUSE

Dyer relies on his PRP at 46.

G. UNDER THE BOARD'S REASONING, RCW 9.95.009(2) IS VOID FOR VAGUENESS UNDER THE DUE PROCESS CLAUSE

As the ISRB notes, this Court held in In re Myers, 105 Wn.2d 257, 714 P.2d 303 (1986), that the statutory requirement that the ISRB make decisions "reasonably consistent" with the SRA was not unconstitutionally vague. The Myers Court, however, undoubtedly believed that the provision would result in pre-SRA and SRA offenders serving approximately the same amount of time. It could not have known that the ISRB would continue to hold a prisoner such as Mr. Dyer even though he had already served *six times* the high end of the standard range. Nor could it have known that the ISRB would hold a prisoner such as Mr. Dyer *indefinitely* as long as he denied guilt. If RCW 9.95.009(2) is broad enough to permit the ISRB's practices in this case, then it is clearly void for vagueness. As things stand, no pre-SRA prisoner has any idea how this provision might affect his chances for release at a parole hearing.

H. THE BOARD'S DECISION IN THIS CASE VIOLATES SUBSTANTIVE DUE PROCESS

Dyer relies on his PRP at 47-48.

I. THE BOARD'S ACTIONS AMOUNT TO CRUEL AND UNUSUAL PUNISHMENT

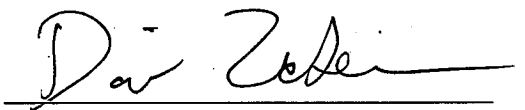
Dyer relies on his PRP at 48-49.

VI. CONCLUSION

The Court should once again find that the ISRB abused its discretion and order the ISRB to parole Dyer upon appropriate conditions, no later than 90 days from the date of its decision. In the alternative, the Court should order it to hold a new hearing at which it must not rely on the factors this Court has found to be impermissible.

DATED this 2nd day of July, 2007.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States Mail one copy of the foregoing Reply Brief Personal Restraint Petition on the following:

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SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of:

RICHARD J. DYER.

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EXHIBIT A

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INTRODUCTION

On April 13, 2005, the Supreme Court Commissioner entered a Ruling denying petitioner Dyer's motion for discretionary review. He filed a motion to modify the Commissioner's Ruling. The En Banc Court granted Dyer's motion to modify and motion for discretionary review on September 15, 2005. This supplemental brief is filed pursuant to this Court's Order dated September 22, 2005.

STATEMENT OF THE CASE

Petitioner Richard Dyer was convicted by a jury of first degree rape of two women—Ms. A, and Ms. B. *State v. Dyer*, No. 6162-7-II, slip op. at 1 (Wash. Ct. App. Aug. 14, 1984). These rapes were calculated crimes—not crimes of impulse. Ms. A was kidnapped when she accepted a car ride from Dyer and another man. *Id.* at 2. While in the car Dyer "undressed and raped her for the first time". *Id.* Dyer "then made her lie naked on the floorboards as they drove to a house". *Id.* "Before leaving the car to go into the house [Dyer] put a coat over her head so that she could see very little." *Id.* Once in the house, "she was tied hands and feet to a bed with ropes that were already there" and Dyer "replaced the coat over her head with cotton balls and taped them over her eyes". *Id.* Dyer "applied contraceptive foam to Ms. A, and raped her a second time. The

sexual assaults continued throughout the night." *Id.* In the morning, Dyer "gave her a bath and dressed her in her clothes which had been washed and dried". *Dyer*, slip op. at 2. Ms. A was then driven to a rural area and released.

Similarly, Ms. B was forced into a car by Dyer and another man. *Id.* at 3. While on the road, Dyer "put cotton balls secured with tape over Ms. B's eyes [and she] remained blindfolded throughout the night". *Id.* She was "taken to a house, undressed by [Dyer] and tied hands and feet to a bed". *Id.* Dyer "applied contraceptive foam to her and raped her repeatedly". *Id.* In the morning, Dyer "washed and dried her clothes, gave her a bath and dressed her". *Id.* "Ms. B was released in a park." *Id.*[1]

Dyer was convicted under RCW 9.95.100 and .110, mandatory life sentence and parole release. Under this system the Indeterminate Sentence Review Board (Board) makes the decision about the duration of confinement. In making this decision, the Board is to "consider the purposes, standards, and sentencing ranges adopted pursuant to RCW 9.94A.850 and the minimum term recommendations of the

[1] Dyer was also convicted of raping Ms. W, both while she was his estranged wife and after they were divorced. These crimes were similar in that they involved tying the victim down and raping her. *Dyer*, slip op. at 4. The Court of Appeals reversed the conviction for raping Ms. W, because the trial court erred in not granting the defense's motion to try Dyer separately for the alleged rape of Ms. W. *Id.* at 10-12.

sentencing judge and prosecuting attorney". RCW 9.95.009(2). The Board set Dyer's minimum term at 240 months. The Board departed from the Sentencing Reform Act (SRA) guidelines of 68-88 months for each count because the "commission of the offense manifested deliberate cruelty to the victim". Indeterminate Sentence Review Board,[2] Decisions [sic] And Reasons, 9/15/86, at 1.[3] The Board also pointed to the fact that the prosecuting attorney's "recommendation was 50 years and the judge's recommendation is life". *Id.* The Board also referred to a letter from the judge in the case, which stated that "Dyer is a dangerous offender. I denied him a release pending appeal on the grounds that he is a danger to be at large." *Id.* The judge's letter concluded that Dyer "should be held in custody until the parole board is absolutely sure that he will not reoffend". *Id.* at 2.

In addition to setting a minimum term, the Board determines whether to parole an inmate before the end of his or her maximum term. In making the parole decision, the Legislature emphasized public safety. RCW 9.95.009(3) provides that the "board *shall give public safety considerations the highest priority* when making all discretionary

[2] Indeterminate Sentence Review Board will be indicated as ISRB in future citation references.

[3] This document is attached as Exhibit 4 to the State's Response To Motion For Discretionary Review dated March 29, 2005.

decisions on the remaining indeterminate population *regarding the ability for parole, parole release*, and conditions of parole". (Emphasis added.) Indeed, RCW 9.95.100 directs that the "board *shall not* . . . until his . . . maximum term expires, *release a prisoner, unless in its opinion his . . . rehabilitation has been complete and he . . . is a fit subject for release*". (Emphasis added.)

In 1994 the Board considered Dyer's eligibility for parole. The evidence presented included a Psychological Evaluation performed by Dr. Helmut Riedel. Dyer continued to claim "that he did not commit any of the crimes". Psychological Evaluation, 3/5/93, at 1.[4] Dr. Riedel found that Dyer "*may have a tendency towards denial* . . . in that he denied any physical abuse of women, although the record shows that his first wife had a restraining order on him and did accuse him of physical violence". *Id.* at 4 (emphasis added). Dr. Riedel concluded that "[r]isk of reoffense is estimated to be high, based on the assumption that the jury convictions are accurate and that Mr. Dyer is currently in a state of denial." *Id.* Dr. Riedel also concluded that the "[d]epth of [Dyer's] sexual deviancy is also estimated to be high based on the same assumption and on the fact that any sexual deviancy has remained essentially untreated during his

[4] This document is attached as Exhibit 7 to the State's Response To Motion For Discretionary Review dated March 29, 2005.

incarceration." *Id.* The Board denied parole, stating that "[i]t is very difficult to take a look at the aggravated nature of these crimes and the psychological report and the 052 report and the lack of any kind of crime related counseling or treatment as well as the denial, and then find Mr. Dyer parolable." ISRB, Decision And Reasons, 2/2/94, at 4.[5]

The Board considered Dyer's parole again in 1995. There was a new Psychological Evaluation prepared by Dr. William Jones. According to Dr. Jones, "without the benefit of specific treatment for sexual deviancy the risk of reoffense remains high". Psychological Evaluation, 12/7/94, at 3.[6] The Board again denied parole. It noted Dr. Jones' conclusion that "without treatment, the risk of reoffense remains high". ISRB, Decision And Reasons, 3/8/95, at 3.[7] The Board also noted Dr. Riedel's "documentation of Mr. Dyer's tendency toward denial". *Id.* at 4.

The Board considered Dyer's parole again in 1998. A new Psychological Evaluation was performed by Dr. Lauby. Based on certain psychological tests, Dr. Lauby rated Dyers risk of reoffense as "low to

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[5] This document is attached as Exhibit 5 to the State's Response To Motion For Discretionary Review dated March 29, 2005.

[6] This document is attached as Exhibit 8 to the State's Response To Motion For Discretionary Review dated March 29, 2005.

[7] This document is attached as Exhibit 6 to the State's Response To Motion For Discretionary Review dated March 29, 2005.

medium". ISRB, Decision And Reasons, 8/11/98, at 2.[8] However, on another test, "Dr. Lauby noted [Dyer] failed to acknowledge even normal sexual desires and interests. His replies indicated very little, if any, motivation for treatment." *Id.* Dr. Lauby "considered that Mr. Dyer's knowledge of human sexuality is borderline *and his general performance may be considered fairly dishonest*". *Id.* The Board also noted that Dyer's "current and past counselor both testified that Mr. Dyer is manipulative and controlling on the unit". *Id.* at 2-3. The Board concluded that a "review of Mr. Dyer's institutional adjustment and behavior with staff seems to indicate additional manipulation and control. After a careful review of all available file materials, it is the Board's conclusion that the only responsible decision is to continue to find Mr. Dyer not parolable." *Id.*

The Board last considered Dyer's parole in 2002. At that time it had before it a Sex Offender Psychological Report prepared by Licensed Mental Health Counselor Carson Carter. According to Mr. Carter, Dyer's scores on psychological tests "are typical of sex offenders who present a

[8] This document is attached as Exhibit 10 to the State's Response To Motion For Discretionary Review dated March 29, 2005.

low risk to reoffend". Sex Offender Psychological Report, 9/26/03, at 3.[9] Mr. Carter concluded that if "we are gauging risk, [Dyer] has met the criterion for a less restrictive environment [and] could be considered for community supervision". *Id.* at 4. At the hearing, Mr. Dyer's attorney, Mr. Lahtinen, asserted "that Mr. Dyer at least as far as the testing is concerned, is not a risk to the community, not a risk to reoffend. In that sense, this new report differs a little bit from previous reports." ISRB, Tr. .100 Hearing 12/4/01, at 10.[10] However, as a member of the Board explained:

> *What I'm trying to do is to place a bet with somebody else's life that you'll leave them alone*, is what it really boils down to. . . . I have to look at what the social scientist tell us. . . . I do look at them and they have some significance, but it is considerably an imprecise area that will vary, even the same test scores will vary from examiner to examiner.

ISRB, Tr. .100 Hearing 12/4/01, at 15 (emphasis added).

The Board again denied Dyer parole. According to the Board, a "central difficulty for the Board is that Mr. Dyer remains an untreated sex

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[9] This document is attached as Appendix E in the Appendix To Motion For Discretionary Review.

[10] This document is attached as Appendix G in the Appendix To Motion For Discretionary Review.

offender". ISRB, Decision And Reasons, 1/30/02, at 3.[11] Thus, "Mr. Dyer shows that he is an orderly person, careful in his work and is able to maintain himself within the institution [but] that's precisely the behavior demonstrated in the crimes." *Id.* The Board pointed to the "calculation, the laundering and washing to remove clues and not resorting to deadly force, but releasing the victims, are all consistent with the typology that this particular crime exhibits". *Id.* The Board acknowledged that "[p]sychological data in the file from the early 1990s indicated a relatively high reoffense risk [but] this risk appears to have been ameliorated in current psychological tests." *Id.* at 4. However, the Board was concerned about the "ability to learn how to take psychological tests [and Dyer's] criminal behavior reflects a high level of manipulation and sophistication". *Id.* The Board concluded that Dyer "is an untreated sex offender with behaviors that are apparently motivated when he is in a period of stress. The Board would anticipate that upon release . . . Dyer would encounter far more stresses than he may now, having accommodated to his life in the institution. It's the potential reaction to that stress that is of significant concern to the Board as a trigger to more

[11] This document is attached as Exhibit 11 to the State's Response To Motion For Discretionary Review dated March 29, 2005.

attacks." *Id.* at 3-4. Thus, "the only responsible decision is to continue to incapacitate Mr. Dyer as not rehabilitated and fit to be released". *Id.* at 4.

ISSUE

Although it incorporated other arguments by reference, Dyer's Motion To Modify Commissioner's Ruling, granted by this Court, raised one basic issue. Dyer asked the Court to "take review to clarify the limits of the [Board's] discretion to deny parole". Mot. Mod. Comm's Ruling at 3. We state the issue as follows:

Did the Board abuse its discretion by denying Dyer parole after finding he was not rehabilitated, based on all of the information available to the Board, including Dyer's failure to participate in a sex offender treatment program that was unavailable to him due to his choice to deny responsibility for his two First Degree Rape convictions?

ARGUMENT

1. The Decision Of The Board Must Be Sustained Unless The Board Abuses Its Discretion

Inmates have no liberty interest in being released before serving the full maximum sentence. *In re the PRP of Marler*, 108 Wn. App. 799, 807, 33 P.3d 743 (2001) (citing *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 7, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979)); *In re the PRP of Ayers*, 105 Wn.2d 161, 164-166, 713 P.2d 88 (1986).

In making decisions regarding parole, the Board is endowed with a "high degree of discretion". *In re the PRP of Ecklund*, 139 Wn.2d 166,

174, 985 P.2d 342 (1999). Moreover, "between a statutory requirement that a prisoner is not to be released until rehabilitation is complete and a duty to attempt consistency with the SRA, the statutory requirement [not to release until rehabilitation is complete] trumps the duty to attempt [consistency with the SRA]". *In re the PRP of Addleman*, 151 Wn.2d 769, 775, 92 P.3d 221 (2004). Unlike sentencing courts, the Board may (and in fact, must) consider additional factors, such as "rehabilitative aims" in determining a minimum term for a prisoner sentenced before enactment of the SRA. *In re the PRP of Locklear*, 118 Wn.2d 409, 413-14, 823 P.2d 1078 (1992). Thus, when it imposes sentences outside the standard range, the Board may consider the pre-SRA offender's level of rehabilitation. *In re the PRP of Chavez*, 56 Wn. App. 672, 675, 784 P.2d 1298 (1990).

This Court has emphatically stated that the courts of this state are "*not* a super Indeterminate Sentencing Review Board and [they] will not interfere with a Board determination in this area unless the Board is first shown to have *abused its discretion* in setting a prisoner's discretionary minimum term". *In re the PRP of Whitesel*, 111 Wn.2d 621, 628, 763 P.2d 199 (1988); *In re the PRP of Myers*, 105 Wn.2d 257, 264, 714 P.2d 303 (1986). An abuse of discretion exists only if it can be said that the

Board acted for untenable reasons, or if no reasonable person could have made the same decision. *Wilson v. Bd. of Governors*, 90 Wn.2d 649, 656, 585 P.2d 136 (1978). Thus, the Board abuses its discretion when it fails to follow its own procedural rules, by failing to consider the standard ranges set forth in the SRA, or where the Board's decision is unsupported by the evidence. *In re the PRP of Addleman*, 151 Wn.2d at 776-77.

2. The Board Did Not Abuse Its Discretion When It Found Dyer To Be Unparolable

In making its decisions about Dyer, the Board is governed by the statutory requirement that it "*give public safety considerations the highest priority* when making all discretionary decisions on the remaining indeterminate population *regarding the ability for parole, parole release*, and conditions of parole". RCW 9.95.009(3) (emphasis added). Under RCW 9.95.100, the "board *shall not* . . . until his . . . maximum term expires, *release a prisoner, unless in its opinion his . . . rehabilitation has been complete and he . . . is a fit subject for release*". (Emphasis added.) In this case, despite the psychological testing reported by Mr. Carter, the Board refused to parole Dyer because he is an untreated sex offender. This is not an abuse of discretion because it cannot be said that that the Board acted for untenable reasons, or that no reasonable person could have made the same decision. *Wilson*, 90 Wn.2d at 656.

Treatment for sex offenders is vital to assuring public safety. The United States Supreme Court recognized this in *McKune v. Lile*, 536 U.S. 24, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002). The issue in *McKune* was whether a state sex offender treatment program that required inmates to admit responsibility for sexual crimes violated the Fifth Amendment right against self incrimination. In considering the issue the Supreme Court discussed the importance of treatment. "When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault. See *id.*, at 27; U. S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p 6 (1997)." *McKune*, 536 U.S. at 33. However,

> [t]herapists and correctional officers widely agree that *clinical rehabilitative programs can enable sex offenders to manage their impulses and in this way reduce recidivism.* See U. S. Dept. of Justice, Nat. Institute of Corrections, A Practitioner's Guide to Treating the Incarcerated Male Sex Offender xiii (1988) . . . .

Id. (emphasis added).

In this case, the Board stated that "Dyer remains an untreated sex offender. . . . Completion of a sex offender treatment course generally requires what is called full candor by the treating authorities, and Mr. Dyer continues to maintain his innocence." ISRB, Decision And Reasons, 1/30/02, at 3.

Taking responsibility is an key component in rehabilitation. The United States Supreme court recognized this in *McKune*, stating, "[d]enial is generally regarded as a main impediment to successful therapy, and therapists depend on offenders' truthful descriptions of events leading to past offences in order to determine which behaviors need to be targeted in therapy." *McKune*, 536 U.S. at 33 (citing H. Barbaree, *Denial and Minimization Among Sex Offenders: Assessment and Treatment Outcome*, 3 Forum on Corrections Research, No. 4, p. 30 (1991)). Indeed, "[r]esearch indicates that offenders who deny all allegations of sexual abuse are three times more likely to fail in treatment than those who admit even partial complicity. See B. Maletzky & K. McGovern, Treating the Sexual Offender 253-255 (1991)." *Id.* at 33. Even the dissent in *McKune* recognized the importance of treatment and taking responsibility. *Id.* at 68 (Stevens, J., dissenting) ("Mental health professionals seem to agree that accepting responsibility for past sexual misconduct is often essential to successful treatment, and that treatment programs can reduce the risk of recidivism by sex offenders. See Winn, Strategic and Systematic Management of Denial in Cognitive/Behavioral Treatment of Sexual Offenders, 8 Sexual Abuse: J. Research and Treatment 25, 26-27 (1996).").

Given the importance of sex offender treatment, it is not an abuse of discretion for the Board to refuse to parole an untreated sex offender. This is not a situation where the Board has refused to parole Dyer simply because he will not admit his guilt. This Court has directly addressed the issue as to whether the Board may use a prisoner's denial of guilt, at least in part, as a basis for denying parole and imposing an exceptional sentence. In *In re the PRP Ecklund*, this Court overturned the Court of Appeals' decision that the Board's "use of denial of guilt as an aggravating factor justifying an exceptional sentence violates a convicted offender's constitutional right to remain silent". *In re the PRP of Ecklund*, 91 Wn. App. 440, 450, 957 P.2d 1290 (1998). Ecklund, a convicted murderer, maintained that he was not guilty of his crime throughout his numerous parolability hearings with the Board. This Court stated that "it would [not] have been appropriate for the Board to base an exceptional minimum term *solely on Ecklund's refusal to admit that he was guilty of the offense which led to his sentence to prison*". *In re the PRP of Ecklund*, 139 Wn.2d at 176 (emphasis added). However, the Court held that the Board was "justified in considering his denial of guilt as a fact bearing on the question of whether he had been rehabilitated and presents a threat to community safety". *Id.* at 176. Thus, admission of guilt is an appropriate

consideration as it relates to an inmates rehabilitation. According the Court in *Ecklund*, "the Board may not demand that Ecklund confess to the murder in order to obtain parole". *In re the PRP of Ecklund*, 139 Wn.2d at 177. But "it was reasonable for the Board to require, for the purposes of therapy, that Ecklund come to grips with the fact that he was convicted of murder and acknowledge the possibility that he might have murdered Betty Jensen during an alcoholic blackout, even though he does not remember committing the crime". *Id.* The Court concluded that "that the Board did not abuse its discretion in denying Ecklund's parole on the basis of its conclusion that he was not rehabilitated and that he posed a threat to community safety". *Id.*

In *In re the PRP of Haynes*, 100 Wn. App. 366, 996 P.2d 637 (2000), the Court of Appeals also held that the Board could consider an inmate's failure to admit guilt as it relates to lack of rehabilitation. In *In re the PRP of Haynes*, the offender was convicted of several crimes, including first degree rape. The Board repeatedly found him not parolable, citing his lack of "specific sexual deviancy therapy", his escalation to the use of force and weapons, and his risk to the public. *Id.* at 370. In Haynes' last hearing, the Board acknowledged that the offender had received counseling for sexual deviancy, but again found him not

parolable, emphasizing his lack of formal and structured sexual deviancy treatment as well as his "continued denial of two of his offenses". *In re the PRP of Haynes*, 100 Wn. App. at 370. The Board also relied on evidence which indicated that the offender "was a high risk to reoffend and had poor prospects for rehabilitation". *Id.* Haynes argued that "the Board could not consider his refusal to admit guilt". *Id.* at 373. The court rejected that argument, concluding that "because there is a nexus between denying guilt and lack of rehabilitation, the Board could properly consider the denial. 'We agree with the Ninth Circuit's statement in *Gollaher v. United States,* 419 F.2d 520, 530 (9th Cir. 1969) *that the first step toward rehabilitation is the offender's recognition that he was at fault.*'" *Id.* at 373.

Dyer's case is similar to that of *Haynes* and *Ecklund*. Dyer, an untreated sex offender, has been determined by the Board on numerous occasions to be unparolable because he was not completely rehabilitated and a fit subject for release. RCW 9.95.100. Consequently, the Board properly followed its express statutory directive and denied parole to Dyer. *See* RCW 9.95.100. The Board's determination that Dyer was not rehabilitated was based on the fact that he is an untreated sex offender. Because Dyer chooses to continue to deny responsibility for his actions, he

has not received the benefit of sexual deviancy treatment, and thus remains unrehabilitated.

Dyer relies primarily on the Sex Offender Psychological Report prepared by Mr. Carter, which concluded that he was a low risk to reoffend. This report must certainly be a factor in the Board's decision. But the Board is entitled to consider other factors as well – the cruelty of Dyer's crimes and the fact that his rape convictions are presumptively valid and final. In contrast, Dyer's self-serving, entirely unsupported denials of guilt are entitled to no weight. The Board also had before it the Psychological Evaluations of Dr. Riedel, Dr. Jones, and Dr. Lauby. There is the calculating nature of Dyer's crimes, and the fact that his current behavior is consistent with those crimes. The Board was also concerned that Mr. Carter's conclusions were based on psychological tests that an inmate could learn how to take successfully. Ultimately, the Board cannot delegate its parolability determinations under RCW 9.95.100 to a psychological evaluator it employs to investigate an inmate. As the United States Supreme Court held in *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979):

> The parole-release decision . . . depends on an amalgam of elements, some of which are factual but many

> of which are purely subjective appraisals by the Board members based upon their experience with the difficult and sensitive task of evaluating the advisability of parole release. . . .
>
> . . . .
>
> The decision turns on a "discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done."

Greenholtz, 442 U.S. at 9-10.

Without doubt, the Board's discretion, though significant, is subject to judicial review, and the Board does not claim that its discretion is unfettered. If, for example, Dyer had successfully completed the sex offender therapy program, the Board's refusal to parole him might then be legitimately viewed as an abuse of its discretion. However, those are not the facts of this case and the Board is permitted to "look behind the curtain" – to consider the evaluation by Mr. Carter in Dyer's case.

In sum, the answer to Dyer's implicit question: "What more do I need to do to demonstrate that I am parolable?" – is that he need only bear his burden in regard to RCW 9.95.100's unequivocal requirements: Demonstrate that he is rehabilitated and a fit subject for release. Because Dyer has chosen to continue to deny having committed the rapes of which he was lawfully convicted, he has not been permitted to enter the Sex

Offender Therapy Program and thus has not been rehabilitated, *by dint of his choice*. Without such rehabilitation, the Board's decision denying Dyer parole is not an abuse of its discretion.

3. The Board Does Not Determine An Inmates Guilt Or Innocence In Making Its Parole Decisions

It is not the Board's function to retry cases, or to adjudicate guilt or innocence of those offenders under its jurisdiction. Rather, as set out by RCW 9.95.100, the Board's function is to determine, based upon an amalgam of different factors, whether an offender is rehabilitated and a fit subject for release. In contrast, the Clemency and Pardon Board is authorized to "receive petitions from individuals, organizations, and the department for review and commutation of sentences and pardoning of offenders in extraordinary cases, and shall make recommendations thereon to the governor". RCW 9.94A.880(1). If Dyer persuaded the Pardon Board of his innocence, it could recommend that the governor commute his sentence, and the governor would have the authority to do so

Moreover, it makes no policy sense to require the Board to give credence to Dyer's claims of innocence. First, the Board has no way to validate claims of innocence.[12] Second, if the Board must simply take an

[12] In *State v. Dyer*, No. 6162-7-II, slip op. at 1 (Wash. Ct. App. Aug. 14, 1984), the Court of Appeals rejected Dyer's claims of innocence.

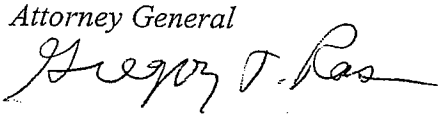
inmates word for the fact he or she did not commit the crime—then no inmate need take sexual offender treatment to be rehabilitated for parole. This result is inconsistent with the Legislative requirement that the Board "*give public safety considerations the highest priority* when making all discretionary decisions on the remaining indeterminate population *regarding the ability for parole, parole release*, and conditions of parole". RCW 9.95.009(3) (emphasis added).

CONCLUSION

For the above stated reasons, the Respondent respectfully requests that this Court affirm the decision of the Washington Court of Appeals in Mr. Dyer's case, and dismiss his personal restraint petition with prejudice.

RESPECTFULLY SUBMITTED this 26th day of October, 2005.

ROB MCKENNA
Attorney General



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